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8 **UNITED STATES DISTRICT COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**  
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11 ROBERT ALBERGO, an individual;  
12 DAVID IRWIN, an individual,  
13  
14 vs. Plaintiffs,  
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16 IMMUNOSYN CORPORATION, a  
Delaware Corporation, et al.,  
Defendants.

CASE NO. 09cv2653-DMS (MDD)  
ORDER DENYING  
DEFENDANTS' MOTION TO  
RE-OPEN DISCOVERY

[ECF NO. 197]

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18 On May 25, 2012, Defendants' filed an *ex parte* Motion to Re-open Discovery.  
19 (ECF. No. 197). Plaintiffs filed on Opposition. (ECF. No. 200). For the reasons  
20 presented herein, Defendants' motion to re-open discovery is denied.<sup>1</sup>

21 Background

22 The initial complaint in this case was filed November 24, 2009. Discovery  
23 opened December 20, 2010. (ECF No. 76). A formal order regulating discovery was  
24 issued shortly after the filing of the Second Amended Complaint. (ECF Nos. 123,  
25 137). Defendants were represented by counsel until August 22, 2011. (ECF Nos. 138,  
26 142). All discovery closed March 12, 2012. On April 5, 2012, Plaintiffs filed a Motion

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28 <sup>1</sup> All of the corporate Defendants have been defaulted and there has been no motion to lift the default. Accordingly, the Court will consider the instant motion only in regard to the individual Defendants.

1 for Partial Summary Judgment. (ECF. No. 184). On May 8, 2012, three days before  
2 the scheduled hearing on Plaintiffs' motion for summary judgment, new counsel  
3 entered his appearance and Defendants filed an ex parte application for a ninety-day  
4 continuance of the summary judgment hearing. (ECF No. 191). The district judge  
5 issued an order on May 10, 2012, extending the dates for: 1) the filing of Defendants'  
6 opposition; 2) the final pretrial conference; and 3) the trial. (ECF No. 194).

7 In support of their motion to re-open discovery, Defendants rely upon the  
8 arrival of new counsel and claim that they "stand to be prejudiced by not being able  
9 to obtain necessary trial information in the defense of their case." (Defs'. Mtn. at 3).  
10 Defendants state that previous counsel focused on settlement and failed to propound  
11 any discovery in preparation for trial. Consequently, Defendants assert that they are  
12 completely unprepared for a trial on the merits. (Id. at 3). Defendants' motion does  
13 not identify any specific discovery that they seek to obtain; the request is for a  
14 general re-opening of discovery.

15 In opposing Defendants' motion, Plaintiffs' contend that while discovery was  
16 open Defendants "did not propound any discovery, of any nature, upon the Plaintiffs."  
17 (Pls'. Opp at 2). Plaintiffs also contend that Defendants' response to the discovery  
18 propounded by Plaintiffs was a blanket assertion of the 5<sup>th</sup> Amendment privilege  
19 against self-incrimination and that Defendants did not produce any requested  
20 documents. (Id.)

### 21 Discussion

22 Federal Rule of Civil Procedure 16(b)(4) provides "[a] schedule may be modified  
23 only for good cause and with the judge's consent." The Ninth Circuit has held that  
24 "Rule 16(b)'s 'good cause standard' primarily considers the diligence of the party  
25 seeking amendment." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9<sup>th</sup>  
26 Cir. 1992). "Although the existence or degree of prejudice to the party opposing  
27 modification might supply additional reasons to deny a motion, the focus of the  
28 inquiry is upon the moving party's reasons for seeking modification." *Id.* (internal

1 citations omitted). Here, Defendants have not demonstrated the requisite diligence  
2 necessary to demonstrate good cause.

3 In support of their motion, Defendants note they were without legal  
4 representation from August 26, 2011 to May 8, 2012, rendering them unable to  
5 conduct discovery. This claim is meritless - parties representing themselves in civil  
6 actions before this court, including prisoners, regularly propound and litigate  
7 discovery requests. Discovery opened in this case on December 20, 2010, when the  
8 magistrate judge previously assigned to the case issued an order stating “[d]iscovery  
9 may commence on the issue set forth in the Complaint at this time.” (ECF No. 76). In  
10 April 2011, upon transfer to this Court, regular telephonic case management  
11 conferences were held to discuss the status of the case including the status of  
12 discovery. The Court’s notes reflect that during case management conferences  
13 Defendants, through counsel, did not claim an inability to timely pursue discovery.  
14 Indeed, the parties filed a Joint Discovery Plan on July 28, 2011 (ECF No. 128) and  
15 on August 18, 2011, a scheduling order imposing a discovery deadline of March 12,  
16 2012 was filed. (ECF No. 137). Following the filing of the scheduling order, the Court  
17 continued to hold telephonic case management conferences.

18 Notably, the last two case management conferences were held after  
19 Defendants’ counsel had withdrawn. Now representing themselves, Defendants did  
20 not raise the issue of discovery or attempt to seek relief from the discovery deadlines.<sup>2</sup>  
21 ( ECF Nos 168 and 178). Even after new counsel entered an appearance May 8, 2012,  
22 it wasn’t until May 25, 2012, that the instant motion was filed.

23 It simply is not enough, considering the history of this case, that general  
24 discovery should be re-opened solely because new counsel has entered the case. As  
25 noted above, the inquiry is whether the party seeking relief has been diligent in  
26 meeting the deadlines contained in the pretrial scheduling order. Here, discovery has

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27 <sup>2</sup> The Court acknowledges that the corporate defendants were unable to participate in those case  
28 management conferences due to their lack of representation and, since they have been defaulted, are not  
being considered in this motion.


1 been open since December 20, 2010, and Defendants have offered little, beyond the  
2 entry of new counsel, in support of their claim that would justify re-opening  
3 discovery. “[C]arelessness is not compatible with a finding of diligence and offers no  
4 reason for a grant of relief.” *Johnson*, 975 F.2d at 609. For these reasons, the Court  
5 declines to re-open discovery.

6 Conclusion

7 Defendants’ motion to re-open discovery is **DENIED**.

8 **IT IS SO ORDERED.**

9 DATED: July 2, 2012

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12 Hon. Mitchell D. Dembin  
13 U.S. Magistrate Judge  
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